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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KAREN SUE NAYLOR, Plaintiff and Appellant, v. AKIYAMA TSUKEMONO CALIFORNIA, INC., et al., Defendants and Respondents.	B231028 (Los Angeles County Super. Ct. No. YC056502)

APPEAL from a judgment of the Superior Court of Los Angeles County. Morris P. Jones, Judge; Michael P. Vicencia, Judge. Reversed and remanded with direction.

Law Offices of Robert W. Cohen, Robert W. Cohen and Mariko Taenaka, for Plaintiffs and Appellants.

Rehm & Rogari and Joanna Rehm, for Defendant and Respondent Akiyama Tsukemono California, Inc.

Karen Sue Naylor, appearing as the bankruptcy trustee for plaintiff Kazuto Takeda, dba as Ebisu Market, appeals from the judgment in her favor against defendants Akiyama Tsukemono, California, Inc., and Makoto Miyahara, contending that the amount of the damage award was grossly understated due to a miscalculation by the trial court that is contrary to the undisputed evidence. We agree, and therefore reverse and remand for a new trial on the issue of compensatory damages only.

FACTS AND PROCEDURAL HISTORY

Ebisu Market, a Japanese grocery store owned by Kazuto Takeda, bought pickled food products known as tsukemono from manufacturer Akiyama Tsukemono California, Inc. Akiyama employee Makoto Miyahara was the regular deliveryman for the market, making twice-weekly deliveries over the course of several years. Takeda, the buyer, relied on Miyahara to check his shelves and tell him how much of each product he needed to order.

Takeda paid in cash at the time of each delivery. Deliveryman Miyahara would give Takeda an invoice for the products delivered, and would turn in a copy of that invoice to his employer Akiyama, the seller. Though the amounts varied, the parties agree that on average Takeda paid $300 per delivery for the various tsukemono items Miyahara delivered. In September 2006, Miyahara went on vacation. His substitute began delivering approximately $100 worth of items each time, prompting Takeda to question why the amount was suddenly lower. He and Akiyama's president, Katsuhisa Yamanaka, compared invoices and discovered that, on average, the invoices submitted to the market showed deliveries worth $300, while the counterparts for the same deliveries that were turned over to Akiyama showed deliveries worth $100.

Based on the invoices, Takeda and Yamanaka determined that Miyahara had engaged in this practice for the years 2000 and 2002-2006. Takeda's invoices for 2001 had been damaged by a water leak and were unavailable, though they assumed the same thing occurred during that year as well. Based on that, they calculated that Takeda had overpaid by approximately $120,000.

Miyahara admitted the thefts, but claimed he perpetrated it by delivering $300 worth of tsukemono products to the market while telling his employer he had delivered only $100 worth, pocketing the difference. He did not, as Takeda claimed, accomplish his theft the other way, by telling Takeda he had delivered $300 worth of products, actually delivering $100 worth and then pocketing the difference. At some point, Akiyama fired Miyahara. Miyahara later paid Akiyama $57,000, a fact that Akiyama suggests shows Miyahara had in fact stolen from his employer. On the other hand, Takeda claimed that Miyahara apologized to him and admitted taking money from his market.

Takeda sued Miyahara and Akiyama for conversion and fraud.[1] There was no dispute that Miyahara made deliveries to the market twice a week. That number was confirmed by witnesses for both sides and by each party's copies of the delivery invoices. Instead, the dispute focused on whether it was Takeda or Akiyama who had been the victim of Miyahara's conduct.

Takeda testified that after learning what Miyahara had done, he checked his shelf space and determined it could not possibly contain the amount of items listed on the invoice deliveries. Thus, even though he had paid $300 for each shipment, less than that was actually delivered. He failed to notice at the time of the fraud that his shelves could not have contained the number of items Miyahara supposedly delivered because he trusted Miyahara and never checked. According to Takeda, Miyahara would bring three or four sealed boxes into the market. Either Takeda or one of his employees would check the items. Because Takeda trusted Miyahara, on several occasions he did not check to see that the invoice matched the items actually delivered. Takeda concluded that Miyahara stocked only part of the items he brought into the market and took the rest back to his delivery truck. After Miyahara was fired, deliveries from Akiyama to the market remained around the $100 range, confirming for Takeda that he had been swindled.

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[1] Takeda is now in bankruptcy and this appeal is being pursued by the bankruptcy trustee, Naylor. For ease of reference, we will refer to Takeda as the party prosecuting this appeal.

Kyoko Spidle, a long-time employee of the market, worked in the deli section and as a cashier. She sometimes checked Miyhara's invoices when he made deliveries. She trusted Miyahara and instead of counting the items herself, Miyahara would count the items and she would check them off. She said that miscounts occurred infrequently. She did not stay to watch Miyahara stock the items.

On cross-examination, Takeda admitted that apart from the delivery invoices, he had no records of the amounts delivered. He took over the store in 1984 and still used the old cash register system, which did not accept bar codes or have any way to track the sale of any particular product. His employees checked and signed off on most of the delivery invoices. The market had surveillance cameras, but Takeda had no video footage that showed Miyahara leaving with product he brought in but failed to stock on the shelves. Takeda admitted that he observed the same type of discrepancy in the delivery amounts on other occasions when a substitute filled in for Miyahara. He also admitted that he had used another supplier of tsukemono products during the years in question, and that because the market lacked a bar code inventory system, he had no records showing the actual sales of tsukemono products either by vendor or as compared to the sale of any other products.

The original trial judge was Morris B. Jones. After the parties rested and argued their cases, he announced his findings. The court found no liability for conversion because Takeda had not shown a "specific identifiable sum of money," characterizing the evidence on that point as speculative. As for the fraud cause of action, the court found that Akiyama was not liable for any fraud by Miyahara. Although Yamanaka sat down with Takeda to figure out the amount of damages, the court characterized that effort as an "attempt to calculate" made without any basis. The court found Miyahara liable for fraud, however, relying on the average $200 discrepancy between what he actually billed the market and what he delivered to Akiyama: "That leaves a difference of $200 per delivery. The court has to make an assumption that you are talking about a delivery based upon a monthly delivery. I have no way of knowing from the testimony how often deliveries were made. If he made deliveries from 2000 to 2006, as [Takeda's economic

expert] testified, that's a total of 72 months. And he would be culpable for damages on that basis and that would come to $14,400 in damages as to Mr. Miyahara." The court also awarded Takeda punitive damages of $6,000 against Miyahara.

Takeda's lawyer requested a written statement of decision, and the court directed Akiyama's lawyer to prepare it. One was prepared, but it is not part of the appellate record. The parties do not dispute that the court's comments from the bench reflect the contents of its statement of decision.

Takeda brought a motion under Code of Civil Procedure section 663 to set aside the judgment and enter a different one on three grounds: (1) the failure to find Akiyama liable for Miyahara's fraud under principles of respondeat superior; (2) the miscalculation of damages at $200 per delivery at a rate of one delivery per month, when the undisputed evidence showed that deliveries were made twice a week for 80 months; and (3) the omission of an award of pre-judgment interest. Because Judge Jones had retired, the case was transferred to Judge Michael P. Vicencia.

Judge Vicencia found the motion was premature because judgment had not yet been entered, and elected to treat it as a motion for reconsideration.[2] The motion was granted in part. The court's minute order states that Akiyama's lawyer was to prepare an amended statement of decision to reflect its liability. However, Judge Jones's damage calculation was ordered "to stand." At the hearing on that motion, Judge Vicencia said the evidence regarding damages was in conflict, making it hard to determine the amount, "[s]o Judge Jones came up with a number using whatever it was he used to come up with that number – and I can't say that was erroneous, so I'm inclined to leave the damage award exactly as it is."

The amended statement of decision made several findings of fact relevant to the issues on appeal. These included the basic facts concerning the falsified invoices and the $200 discrepancy between the $300 amount on the market's copies of the invoices and the $100 amount shown on the copies Miyahara turned over to Akiyama. Judge Vicencia

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[2] In fact, motions under Code of Civil Procedure section 663 may be filed before judgment is entered. (Code Civ. Proc., § 663a, subd. (1).)

found the spreadsheet prepared by Akiyama's president showing the losses involved "was at best a guess" because "there was no true basis for making those calculations." Apart from the delivery invoices, "Takeda did not have any financial records to support his claims. His business with Akiyama through Miyahara was done on a cash basis. He had no records of how many of Akiyama's pickles he sold in a given day, week, month, year, or any other period. He had no cash register receipts or records reflecting sales of Akiyama products. He had no accounting records of sale of Akiyama products. He had no inventory records. [¶] Although the [market] was outfitted with security surveillance cameras, Takeda has no video footage showing that Miyahara was delivering less product than was stated on the delivery memos. [¶] The court finds that deliveries by Miyahara to Ebisu Market were made on a monthly basis from 2000 through 2006. The court also finds that there was a discrepancy of approximately $200 between the $300 that Miyahara would collect in cash from [the market] and the $100 that he would report on the invoice that he would submit to Akiyama."

The amended statement of decision made two more fact findings: that Miyahara committed fraud and that the market could not make out a conversion claim because the amount allegedly converted was speculative, meaning it failed to prove that a specific sum of money had been converted.

In his conclusions of law, Judge Vicencia determined that the market's conversion cause of action failed because of the factual defects mentioned above. He also concluded that although Akiyama had been unaware of the fraud, it was liable under the doctrine of respondeat superior. Judge Vicencia then concluded that Takeda had proved damages of "$200 per month for 72 months, a total of $14,400. Any other claimed damages have not been proved or are speculative in amount." Finally, he reaffirmed the $6,000 punitive damage award against Miyahara and awarded Takeda prejudgment interest of approximately $6,400. Judgment for Takeda pursuant to the terms of the amended statement of decision was then entered.

DISCUSSION

1. *The Parties' Contentions*

At the outset we observe that only Takeda has appealed, and he has appealed only on the insufficiency of the damages award.

Takeda contends that Judge Jones's initial damage award was founded on two miscalculations: (1) that there was no evidence of the frequency of Miyahara's deliveries to the market, leading the court to assume deliveries occurred once a month; and (2) that the time period for which he awarded damages – 2000 through 2006 – covered only 72 months, when in fact the fraud stopped at the end of August 2006, a period of 80 months or nearly 347 weeks. Although Judge Jones accepted the $200 discrepancy between invoice amounts as his starting point, he erred by awarding that amount based on his findings that the deliveries occurred just once a month for 72 months. Instead, the undisputed evidence showed that deliveries took place twice a week, which amounted to $138,800 over a 347 week period.[3]

According to Takeda, Judge Vicencia made essentially the same finding, repeating Judge Jones's miscalculations. Because the findings are at odds with the undisputed evidence, Takeda contends there is no evidence to support the damage award, and asks that we reverse and substitute in the correct number.[4]

Akiyama does not dispute that it made twice-weekly deliveries to the market during the relevant period. Instead, it contends that the trial court's findings reflect nothing more than its discomfort with the lack of evidence to support Takeda's claims, such as inventory and sales records. Although the trial court agreed there was a $200 discrepancy on each delivery invoice prepared by Miyahara, it did not find, and did not

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[3] In his opening appellate brief, Takeda comes up with a figure of $137,600 based on 344 weeks, presumably by rounding down to four weeks a month during the eight applicable months in 2006. We have added the number of days from January 1 through August 31, 2006, and divided by 7 to come up with the true number.

[4] Takeda does not challenge the judgment as to his conversion cause of action.

necessarily have to believe, that all of that discrepancy was necessarily attributable to Miyahara delivering less merchandise to the market than he charged. Because Miyahara testified that he worked his swindle the other way, by delivering the full amount to the market while telling Akiyama he had delivered less, the trial court was entitled to believe Miyahara only in part and come up with an estimate of how much Miyahara shorted the market as opposed to his employer.

2. *Standard of Review*

The trial court's statement of decision provides its reasoning on disputed issues and is the measuring stick by which we determine whether its decision is supported by the facts and the law. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268 (*Shaw*).)

We review the trial court's findings of fact to determine whether they are supported by substantial evidence. To the extent the trial court drew conclusions of law from those findings, we review them de novo. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.) We consider all the evidence in light of the prevailing party, drawing all reasonable inferences and resolving all conflicts in favor of the findings. However, substantial evidence does not mean *any* evidence. The ultimate test is whether the finding was reasonable in light of the entire record. (*Ibid.*) A conclusion of law based on a factual finding that is not supported by the record must be disregarded. (*Fort v. Board of Medical Quality Assurance* (1982) 136 Cal.App.3d 12, 20-21.)

3. *There Is Insufficient Evidence to Support the Damage Award*

Although a trial court's oral comments before issuing a statement of decision cannot be used to impeach the judgment, they may sometimes be valuable in illustrating the trial judge's theory. (*Shaw, supra,* 170 Cal.App.4th at p. 268.) At the hearing on Takeda's motion for reconsideration of the statement of decision, Judge Vicencia said that due to the state of the evidence, "Judge Jones came up with that number . . . so I'm

inclined to leave the damage award exactly as it is." In his amended statement of decision, Judge Vicencia repeated the same calculation used by Judge Jones: a discrepancy of $200 per month over a 72-month period, for a total of $14,400.

Miyahara testified that he did not short Takeda on the deliveries, and instead under-reported to Akiyama the amounts he had delivered. Although Akiyama's theory at trial was that it was the lone victim of Miyahara's fraud, Judge Jones certainly found to the contrary when he determined that Takeda was entitled to damages in the first instance. Nor did he try to apportion the undisputed $200 discrepancy per delivery invoice between Takeda and Akiyama. Instead, his findings can only be read as an award of the full discrepancy to Takeda. By not filing a cross-appeal, Akiyama may not argue there was insufficient evidence of liability.

However, the trial court was clearly mistaken when it said there was no evidence about the frequency of deliveries. As noted, it was undisputed that deliveries were made twice a week from 2000 through August 2006, when Takeda discovered the discrepancy. If Judge Jones had followed his reasoning through based on the undisputed evidence, he would necessarily have reached a higher figure for the damage award.

Judge Vicencia adopted this faulty reasoning in his amended statement of decision. He too found that there was an average discrepancy of $200 on Miyahara's invoices. Despite his (and Judge Jones's) qualms about Takeda's failure to provide better evidence, he specifically found that Miyahara made the deliveries from 2000 through 2006, that there was a $200 discrepancy per delivery invoice, and multiplied that amount by 72 months to reach the same damage award as had Judge Jones. Nothing in these findings on the evidence indicates that Miyahara sometimes shorted the market and at other times understated his delivery amounts on the invoice copies he gave Akiyama, thereby justifying a damage award to Takeda in some amount less than $200 per delivery.

In short, the trial court's math expressly limits its findings to the theory that the $200 difference on each delivery invoice represented the essential starting point of its damage calculations. We cannot, as Akiyama contends, imply a finding that the $200 difference can be apportioned between the parties because such a finding is contrary to

the express finding of a $200 loss per delivery, and because there is no evidence in the record to support such a finding. (*Millbrae Asso. for Residential Survival v. Millbrae* (1968) 262 Cal.App.2d 222, 238.) Because the undisputed evidence showed that deliveries were made at nearly eight times the frequency that the trial court found, the $14,400 damage award is not supported by substantial evidence and must be reversed.

Takeda asks that we exercise our power under Code of Civil Procedure section 43 and direct entry of judgment based on his calculations. Akiyama contends that a reversal should result in remand for a new trial on all issues, because both liability and damages are so intertwined. We choose a middle course. Under section 43, we may order judgment only when proper, and "may direct a new trial where the action seems to demand it. [Citation.]" (*Fortier Transp. Co. v. Union Packing Co.* (1950) 96 Cal.App.2d 748, 757.) Despite their defective findings, both judges were troubled by Takeda's evidence concerning the amounts he claimed had been under-delivered by Miyahara. Although his liability, and the derivative liability of Akiyama, was sufficiently established to the satisfaction of the two judges who presided over this matter, a finding we do not disturb, we conclude a new trial on compensatory damages is the more appropriate relief. Our opinion has no effect on the punitive damages award against Miyahara.

DISPOSITION

The judgment is reversed, only as to the amount of compensatory damages, and the matter is remanded for a new trial on that issue only. Appellant shall recover her appellate costs.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J. FLIER, J.